

In the Supreme Court  
Appeal from the Court of Appeals  
Jansen, P.J., and Meter and Beckering, JJ.

CHANCE LOWERY,

Plaintiff-Appellee,

Docket No. 151600

vs.

ENBRIDGE ENERGY, LIMITED  
PARTNERSHIP and ENBRIDGE  
ENERGY PARTNERS, L.P.,

Defendants-Appellants.

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**BRIEF ON APPEAL – PLAINTIFF-APPELLEE CHANCE LOWERY**

**ORAL ARGUMENT REQUESTED**

LAW OFFICES OF GARY BLOOM  
By: Gary Bloom (P10899)  
39040 W. Seven Mile Rd.  
Livonia, MI 48152  
Phone: (734) 464-1700

ATTORNEY SOURCE, PLC  
By: Nadia M. Hamade (P76944)  
39040 W. Seven Mile Rd.  
Livonia, MI 48152  
Phone: (248) 345-3343  
FAX: (734) 943-6015

*Attorneys for Plaintiff-Appellee*

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**STATEMENT OF THE BASIS OF THE COURT'S JURISDICTION**

On November 8, 2013, the Calhoun County Circuit Court issued its “Order Granting Defendants’ Motion for Summary Disposition.” (App 246a). Pursuant to MCR 7.203(A) and MCR 7.204(A), Plaintiff-Appellee, Chance Lowery (“Plaintiff-Appellee” or “Lowery”), filed a timely claim of appeal to the Court of Appeals, which reversed the trial court’s decision in a 2-1 opinion issued on April 2, 2015. (App 249a).

Defendants-Appellants, Enbridge Energy, Limited Partnership and Enbridge Energy Partners, L.P.’s (“Defendants-Appellants” or “Enbridge”) timely applied for leave to appeal on May 14, 2015, and this Court granted Enbridge’s application for leave to appeal on March 30, 2016. (App 254a). This Court has jurisdiction over Enbridge’s appeal pursuant to MCR 7.303(B)(1).

### **STATEMENT OF QUESTIONS INVOLVED**

In granting leave to appeal, the Court directed the parties to address “(1) whether the plaintiff in this toxic tort case sufficiently established causation to avoid summary disposition under MCR 2.116(C)(10); and (2) whether the plaintiff was required to present expert witness testimony regarding general and specific causation. See *Genna v Jackson*, 286 Mich App 413 (2009).” These questions encompass the heart of this case, and Plaintiff-Appellee will address them in the following order:

(1) “[W]hether the plaintiff was required to present expert witness testimony regarding general and specific causation.”

In a 2-1 decision, the Court of Appeals majority answered: No.

The Court of Appeals dissent answered: Yes.

The trial court would answer: Yes.

Plaintiff-Appellee answers: No.

Defendants-Appellants answer: Yes.

(2) “[W]hether the plaintiff in this toxic tort case sufficiently established causation to avoid summary disposition under MCR 2.116(C)(10).”

In a 2-1 decision, the Court of Appeals majority answered: Yes.

The Court of Appeals dissent answered: No.

The trial court would answer: No.

Plaintiff-Appellee answers: Yes.

Defendants-Appellants answer: No.

## I. INTRODUCTION

Defendants-Appellants admit that Eight Hundred Thirty-Nine Thousand Nine Hundred and Ninety-Nine (839,999) gallons of crude oil were released into the Talmadge Creek and eventually into the Kalamazoo River commencing on July 25, 2010 from their pipeline. This event has come to be known as the “Enbridge Oil Spill” and is the basis for Plaintiff-Appellee’s claims.

This Court has, in the past, declined to invoke a hard requirement that plaintiffs in cases involving toxic torts present expert testimony to establish a prima facie case of causation. *See, e.g., Genna v Jackson*, 286 Mich App 413; 781 NW2d 124 (2009), *lv den* by 486 Mich 1043; 783 NW2d 350 (2010). In certain cases, as it appears Defendants-Appellants agree, a steadfast requirement is unnecessary because “[u]nder [] particular circumstances ... causation could be reasonably inferred without the assistance of an expert.” *See Defendants-Appellants’ Brief on Appeal*, Introduction, p. 1, ¶ 1. This case is much like *Genna*, where there was sufficient evidence upon which a jury could reasonably infer both general and specific causation. Notwithstanding, to make a prima facie showing of causation, Plaintiff-Appellee did present a qualified medical expert to provide testimony, supported by learned treatises specifically on point, to further establish causation.

In this case, Enbridge seeks to raise the threshold to avoid summary disposition from establishing a genuine issue of material fact to requiring a clear showing of causation. This Court should not be inclined to set such a requirement in this case because the precedent will create a legal hurdle that would preclude the common plaintiff from obtaining relief for their injuries, suffered at the hands of toxic torfeasors.

This is not one of those cases, like the cases cited by Defendants-Appellants, where the plaintiff suffered from a disease as a result of exposure to VOCs. Rather, this is a case where Plaintiff suffered from the common symptoms of coughing, headaches and vomiting which are



commonly known to be caused by exposure to the fumes emanating from the Canadian tars sands, heavy crude oil released near Plaintiff-Appellee's home. In fact, several of the neighbors testified to suffering from similar symptoms. Moreover, the Trial Court agreed that there was sufficient evidence to make a connection between the oil and Plaintiff's symptoms of coughing, headaches and vomiting. As a result of Plaintiff's long episode of coughing and vomiting, induced by the noxious odors of the heavy crude that took Enbridge several months, at the very least, to clean up, Plaintiff suffered an avulsion of his short gastric artery. There was testimony of two physicians who explained the short gastric artery is one that runs along the outside of the stomach. Plaintiff-Appellee's expert testified that the rupture was caused by the vomiting and coughing that Plaintiff-Appellee suffered as a result of his exposure to the crude oil fumes emanating from the Enbridge Oil Spill. Based upon this evidence, a reasonable juror could conclude: (a) that it was possible for a person to suffer a rupture of the gastric artery due to the coughing and vomiting caused by the exposure to heavy crude oil fumes (general causation); and (b) that Plaintiff-Appellee's injuries were in fact caused by his exposure to the fumes from the Enbridge Oil Spill.

There may be cause to require expert testimony in some toxic tort cases, for example where a plaintiff claims to have acquire some terminal disease from exposure to toxic substances, and expert testimony is necessary "to link up the etiology" of the disease to the exposure. However, the instant case is one where expert testimony is not necessary. Plaintiff-Appellee, Chance Lowery provided sufficient evidence to establish that: (a) he was exposed to the noxious fumes of the Enbridge Oil Spill at the time of his injuries, (b) the exposure was sufficient to cause him to have headaches, cough and vomit for several days during his exposure, which ultimately lead to the rupture of his short gastric artery, and (c) that his exposure was in fact the cause of his common symptoms and the rupture. Because of the specific facts of this case, additional expert testimony

from a toxicologist is not necessary, and this High Court should not raise the evidentiary threshold to the level sought by the Enbridge Appellants.

In their introduction alone, the Enbridge Appellants admit to the following facts:

- “there was a release of crude oil from Enbridge’s Line 6B oil pipeline into a vacant woodland area located near Marshall, Michigan”
- “crude oil eventually migrated into the Talmadge Creek and then the Kalamazoo River”
- “the oil traveled rapidly down the river for approximately 35 miles, releasing volatile organic compounds (“VOCs”) into the air along the way”
- “Plaintiff Chance Lowery lived more than ten miles away from the release site”
- “the United States Environmental Protection Agency (“EPA”) (the federal agency in charge of directing and monitoring the clean-up of the oil release), [] measured the VOCs throughout the area for months after the release”

Enbridge also admits that there was about 840,000 gallons of Canadian tar sands, heavy crude oil that went by Lowery’s house, which was located about 250 yards from the river. Yet, they claim that there was not enough evidence to even establish that Lowery was exposed to VOCs.

Defendants-Appellants also claim that there was not enough evidence to establish that Lowery was exposed to VOCs at a level necessary to cause his symptoms. However, NIOSH Pocket Guides to the chemicals Toluene, Benzene and Xylene (known to be components of crude oil) which provide that those chemicals cause the specific symptoms of coughing, headaches and vomiting, suffered by Lowery and which ultimately lead to the rupture of his gastric artery. Dr. Nosanchuck also testified that those reactive symptoms after exposure to known irritants are subjective, based upon the sensitivities of each individual. Nonetheless, a jury does not need an expert to tell them that a certain smell can cause one person to cough, vomit or have a headache,

while the same level of exposure may not have the same affect on another person. This isn't a case where Lowery is claiming to have developed some terminal disease from his exposure, where expert testimony would help a jury understand the level of exposure necessary to cause the disease. Lowery is claiming that the VOCs in the crude oil -- known irritants that are commonly known to cause the symptoms he experienced at any level of exposure -- in fact caused him to have common symptoms which lead to the rupture of his gastric artery. Chance Lowery just happened to have a tolerance threshold that was exceeded, according to Dr. Nosanchuck. This was his expert opinion, based upon several decades of experience as a physician and based upon the fact that Lowery was non-symptomatic prior to his exposure to the fumes from the oil spill.

Additional expert testimony sought by Enbridge is not necessary in the instant case. It does not require air sampling to establish that the smell of the oil could cause coughing, headaches and vomiting. Enbridge would like this Court to set the bar so high as to essentially insulate them from any liability for harm resulting from their negligence. This Court has refused to set such standards as to essentially make it impossible for the common plaintiff to establish a case against such negligent tortfeasors, and it should continue to do so. Rather, this Court should find that expert testimony is not required in toxic tort cases, like this one, where exposure to VOCs has been established by other means and where the VOCs are commonly known to cause the symptoms experienced by this plaintiff.

## **II. STATEMENT OF FACTS AND PROCEDURAL HISTORY**

### **A. Enbridge's negligence resulted in the discharge of approximately 840,000 gallons of Canadian tar sands, heavy crude oil into the Talmadge Creek and Kalamazoo River and emissions of volatile organic compounds into the air in the surrounding areas.**

It is undisputed that Defendants-Appellants negligently released nearly Eight Hundred Forty Thousand (840,000) gallons of crude oil into the Talmadge Creek and Kalamazoo River over

the days of July 25<sup>th</sup> and 26<sup>th</sup>, 2010 and that that oil went down the river and caused serious odors and fumes after the Enbridge Oil Spill. (App 223a). It is also undisputed that, as the crude oil was traveling downstream, volatile organic compounds (“VOCs”) were emitted from the crude oil into the air. As the current moved the oil downstream, an accumulation of the heavy crude was left along the shores in its path, which required cleanup measures which took at least several months.<sup>1</sup> (App 51b-52b). Plaintiff-Appellee lived very close to the Kalamazoo River, downstream from the oil spill, approximately two football fields away from the shore and close enough that the river could be seen from his back window. (App 43a). There was testimony that cleanup crews were working near Plaintiff-Appellee’s home, wearing full hazmat suits, including respirators. (App 176a-179a).

Plaintiff-Appellee lived adjacent to the Kalamazoo River at 279 Silver Street, in Battle Creek, Michigan,<sup>2</sup> a few miles from the point where Enbridge’s Line 6B ruptured and approximately two football fields away from the shore, which could be seen from his back window. (App 6a, 43a, 144a; App 43b-44b). Neighbors, friends and Plaintiff-Appellee testified about the putrid odor emanating from the heavy crude oil dumped by Enbridge in the area of Lowery’s home.<sup>3</sup> (See App 224a). Eileen M. Hughes, Plaintiff-Appellee’s neighbor who lived at 247 Silver

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<sup>1</sup> Due to the prior litigation in this case and consolidated discovery with this and other cases involving the Enbridge Oil Spill, the Trial Court was familiar with this information. (App 1b).

<sup>2</sup> Notably, in their Brief on Appeal, p. 6, Defendants-Appellants point out that Lowery’s home was thirteen (13) miles\* from where the Enbridge Line 6B ruptured. The U.S. Fish & Wildlife Service reports that “[h]eavy rains caused Talmadge Creek to overtop its banks and carry oil **38 miles** downstream to the Kalamazoo River, into adjacent floodplains.” *U.S. Fish & Wildlife Service, Natural Resource Damage Assessment and Restoration: 2010 Enbridge Oil Spill in Michigan* <<http://www.fws.gov/midwest/es/ec/nrda/MichiganEnbridge/>> \*Actually, the distance between Plaintiff-Appellant’s home at the time of the Enbridge Oil Spill and the point of the Line 6B rupture was less than eleven (11) miles. (App 54b-57b).

<sup>3</sup> See FN1.

Street, Battle Creek, Michigan<sup>4</sup> (App 71b), testified that, at times, the smell of oil was very strong at her house. (App 72b). Ms. Hughes testified further, as follows:

The smell. I thought my dryer - - I thought the belt on my dryer broke, that is how bad it was. It smelled like rubber burning. It was all through the neighborhood and down the street. You could hardly breathe.

(App 224a). Jereme Green testified that he could smell the crude oil “all the way in town” (about three to four miles from the Kalamazoo River) and that it smelled like “somebody laying down asphalt.” (App 52b-53b). Plaintiff-Appellee testified that the smell was “very strong,” “toxic smelling,” “like asphalt,” and could not be escaped at his home. (App 32a, 176a-177a, 228a). Plaintiff-Appellee’s girlfriend, Ashlee Green, who lived at the same address, testified that the smell was all-pervasive. (App 178a-179a, 224a-225a; App 17b-80b).

Other witnesses testified that the noxious odors lasted several weeks, much longer than Plaintiff-Appellee recalled at the time of his deposition, nearly two years after the Enbridge Oil Spill.<sup>5</sup> David Condon, a friend of Plaintiff-Appellee, who lived nearby, testified that the odors were strong at Plaintiff-Appellee’s home, even after August 18, 2010. (App 224a; App 85b-87b).

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<sup>4</sup> Note that Plaintiff-Appellant lived on the same side of the street and nearby at 279 Silver Street, Battle Creek, Michigan.

<sup>5</sup> In FN4, Defendants-Appellants improperly rely upon *Kaufman & Payton, PC v Nikkila*, 200 Mich App 250; 503 NW2d 728 (1993) to argue that the Court should disregard this evidence because it contradicts Plaintiff-Appellee’s deposition testimony. However, this issue was not preserved. Notwithstanding, the reliance is still improper because Defendants-Appellants misconstrue the opinion of the *Kaufman & Payton, PC* court. In that case, the court, citing Michigan law, determined “that parties may not contrive factual issues *merely by asserting the contrary*.” 200 Mich App 250, 256 (emphasis added). However, that court’s opinion suggested that, while a later-filed, contradictory affidavit of the deponent is not sufficient, other evidence might support “a failure of [a plaintiff’s] memory” reflected in his deposition testimony. In this case, Plaintiff testified at deposition nearly two years after the incident, recalling that the smell lasted about two weeks after the initial oil spill, but with the testimony of other witnesses, supported his argument that the smell persisted three to four weeks after the oil spill and up until the time that Plaintiff suffered a nearly week-long migraine and nausea that resulted in the rupture of his gastric artery.

Joseph Green testified that the smell was “horrendous” and recalled smelling the odor of tar for three to four weeks after the initial pipeline rupture. (See App 225a; App 92b-93b). William Lowery, who, around the time of the Enbridge Oil Spill, visited Plaintiff-Appellee regularly and worked nearby, testified that he recalled the smell “was pretty strong throughout the area” and lasted “at least four to eight weeks.” (See App 225a; App 98b). The Trial Court accepted the facts that fumes from the Enbridge Oil Spill created a horrendous odor at Plaintiff-Appellee’s home. (App 240a).

**B. As a result of exposure to the noxious odor from the heavy crude oil, Plaintiff-Appellee suffered from coughing, migraine headaches and vomiting which ultimately lead to the rupture of his gastric artery.**

Although Plaintiff-Appellee did not have a toxicologist to testify as to the specifics of parts per million or billion of exposure to VOCs at the time of his injury,<sup>6</sup> there was substantial evidence that Lowery was exposed to harmful crude oil fumes, just prior to his injuries. About three weeks after Line 6B ruptured, dumping approximately Eight Hundred Forty Thousand (840,000) gallons of Canadian tar sands, heavy crude oil into the Kalamazoo River, on August 18, 2010, Plaintiff-Appellee was hospitalized and underwent emergency surgery, which was the basis for his complaint in the Trial Court. (See App 60a). Plaintiff-Appellee became ill, suffering from severe headaches and vomiting, after being exposed to the fumes emanating from the Enbridge Oil Spill into the Kalamazoo River, which ran adjacent to his home. (App 31a-34a). The intense headaches and vomiting from which Plaintiff-Appellee was suffering lasted for about five to seven days. (App 34a). Approximately three weeks after the oil spill and during an approximate week-long episode involving migraine headaches and vomiting, Plaintiff-Appellee felt a severe pain that sent him to

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<sup>6</sup> In their Application for Leave to Appeal, Defendants-Appellants attempt to allege that there were air sampling and air monitoring by the EPA. However, this was never argued at the Trial Court, and, therefore, exceeds this Court’s scope of review on application for leave to appeal.

the hospital. *Id.* At the hospital, Plaintiff-Appellee was diagnosed and treated for rupture of his short gastric artery, which runs between the stomach and the spleen. (App 58a-60a).

Plaintiff-Appellee did have a history of mental health problems prior to the accident, for which Plaintiff-Appellee was taking a medication called Lamictal.<sup>7</sup> (App36a-39a). Defendants-Appellants claimed that the Lamictal was the cause of Lowery's migraines, but Plaintiff-Appellee presented evidence to the contrary. Jerry L. Nosanchuk, M.D., a primary care physician of over forty (40) years of experience, testified that it was not unusual for a patient to not know or to be mistaken as to the cause of their medical problems. (App 110a). Dr. Nosanchuk testified that it was his clinical opinion that Lamictal was not "a problem." (App 95a). "The fact [Lowery] remained in contact with the fumes for as long as he did is confirmation enough that he did not realize the extent to which the fumes were affecting him." (App 110a). Plaintiff-Appellee's treating psychiatrist, Anoop Thakur, M.D., an expert witness, testified that Plaintiff-Appellee reported that he believed Lamictal was a cause for his headaches. (App 146a). Nonetheless, Dr. Thakur testified that he did not believe Lamictal caused Lowery's headaches. *Id.* Dr. Thakur testified that the Lamictal, which Plaintiff-Appellee was taking for a long period prior to his injuries, is actually used to prevent migraine headaches, rather than something that would cause a migraine headache. (App 146a-147a).

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<sup>7</sup> In their motion for summary disposition, Defendants-Appellees reference a medical report from November 29, 2007, which indicated that Plaintiff-Appellant previously suffered from nausea and dry heaves "**however it only occurs if he smokes or is around smoke,**" (App 40a), which would tend to support Plaintiff-Appellee's position that exposure to the toxic fumes of the Enbridge Oil Spill triggered Plaintiff-Appellee's nausea which ultimately left him hospitalized with a ruptured gastric artery on August 18, 2010. While Plaintiff-Appellee had complained about nausea again in January 2008, there was no indication that Plaintiff-Appellee was suffering from any nausea at his February 2010 assessment.

Lowery's medical history seems to indicate that that he has a particular sensitivity to smoke and fumes. (App 40a). Lowery testified that he took Vicodin at some point after his migraine started, but was not sure whether "it was the same day or the day before" he started throwing up, leading to the rupture of his short gastric artery. (App 33a-34a). His medical records after the surgery indicate that, at the time, Lowery may have, at least in some part, attributed his vomiting to the Vicodin. (App App 41a). However, Lowery recalled taking Vicodin on several other occasions without any such reaction to taking the medication. (App 33a-34a). When Plaintiff-Appellee learned that others living in his area had suffered similar symptoms after being exposed to the toxic fumes from the Enbridge Oil Spill, Plaintiff-Appellee made the connection between his own symptoms and his exposure to the Enbridge Oil Spill. (App 164a). Lowery testified that after the surgery, the fumes from the Enbridge Oil Spill were gone and he no longer suffered any symptoms. (App 35a).

Additional discovery provided by medical experts was also presented at summary disposition to establish that there existed a genuine issue of material fact as to causation and rebutting Defendants-Appellants' alternate theories of causation. John Koziarski, M.D., the treating surgeon who repaired Plaintiff-Appellee's ruptured gastric artery, provided deposition testimony, declining to give an opinion as to causation of Plaintiff-Appellee's injuries, but **did not rule out the possibility that exposure to the fumes of the Enbridge Oil Spill was the cause.** (App 66a, 69a-70a). Dr. Koziarski testified that, in his experience, avulsion in the gastric artery could be caused by trauma, but that there was no evidence of trauma in Plaintiff-Appellee's case. (App. 29b-30b). Finally, Jerry L. Nosanchuk, D.O., internal medicine and board certified family physician, provided deposition testimony and a written expert opinion that Plaintiff-Appellee's subject injuries were caused by exposure to the fumes of the Enbridge Oil Spill. (App 107a-113a).



Dr. Nosanchuk relied upon information he obtained through research the National Institutes of Health. (App 155a-157a). The articles provided information on the irritative quality of certain components crude oil, the health effects of exposure to those irritants, and on tears of the short gastric artery. *Id.* (App 99b-102b).

Dr. Nosanchuk testified, at his deposition, that he knew the specific chemical constituents which constituted volatile organic compounds that were contained in crude oil and knew them to be irritants and that they were capable of causing cough, nausea, vomiting, irritation of the eyes and other mucus membranes. (App 155a-157a). More particularly, Dr. Nosanchuk testified that one could not identify the specific levels of exposure required to cause these symptoms of irritation “unless you are speaking of a specific person and you would... have to gauge that in retrospect because everybody is different.” (App 157a).<sup>8</sup> Dr. Nosanchuk also testified that he did see patients on a regular basis that suffered from respiratory symptoms caused by irritants and was familiar with the symptoms and treatment of those symptoms. (App 157a-158a). In responding to Defendants-Appellants’ Motion for Summary Disposition, Plaintiff-Appellee attached copies of the Centers for Disease Control and Prevention’s NIOSH Pocket Guides for three of the most volatile chemicals/irritants, including Toluene, Benzene and Xylene, contained in the crude oil which were released during the Enbridge Oil Spill, which contaminated the river flowing just yards from Plaintiff-Appellee’s home at the time. (App 170a-175a). Exposure to all three of these chemicals causes headaches. *Id.* Exposure to Benzene and Xylene causes nausea. (App 170a,

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<sup>8</sup> Plaintiff-Appellee’s medical history showed that he is particularly sensitive to smells, as he has a history, as Defendants-Appellants point out, to cigarettes, which has in the past, caused him to have nausea. A reasonable juror could conclude that Plaintiff-Appellee’s sensitivities and history of developing the similar, yet less intense, symptoms from cigarette smoke, make it more likely that Plaintiff-Appellee did suffer his severe response to his exposure to the fumes from the excessive amounts of heavy crude released during the Enbridge Oil Spill.

174a). Exposure to Xylene causes vomiting. (170a). Additionally, it is apparent that Defendants-Appellants were at all times completely aware of the harmful effects of these chemical irritants, as their own employees were seen in full Hazmat suits, which included respirators, at the scene of the Enbridge Oil Spill. (App 176a-179a).

Dr. Nosanchuk testified that the irritants in the heavy crude oil released during the Enbridge Oil Spill caused Plaintiff-Appellee's medical problems, which are the subject of this lawsuit. (App 161a). Dr. Nosanchuk reviewed Appellant's medical file, and other evidence, including publications from the National Institute of Health, testified that he was aware of the organic compounds in crude oil which cause symptoms, such as nausea, headache and cough, after reported oil spills, and Dr. Nosanchuk conducted medical research on rupture of the gastric artery. (App 107a-108a, 156a-157a). According to Dr. Nosanchuk, based upon his forty-plus (40)+ years of experience as a practicing physician,<sup>9</sup> his medical research, his review of Appellant's medical file and other information provided to him, it was his expert opinion that exposure to the noxious fumes from the oil spill caused Plaintiff-Appellee to suffer from the coughing and vomiting which caused the rupture of Appellant's gastric artery, specifically testifying as follows:

As long as he was having effects from it [exposure to the oil spill fumes]. This is something that happens over time. The literature talks mostly about vomiting..... But I also think the coughing is important, too. ***Basically what happens is with a cough and vomiting, there is a violent displacement of intra-abdominal organs, specifically the spleen because the short gastric artery is attached.*** Actually there is more than one. It runs from the – it comes off the splenic artery and there are various numbers. There might be five or six. They go to the greater curvature of the stomach. What's different about it, and this is my interpretation because I had to look this up, I'm not an anatomist. That is a relatively short area. ***If there's a violent displacement, it's more likely injured than a longer artery which has the ability to flex or straighten out. It's a shorter artery, these are relatively shorter arteries.***

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<sup>9</sup> Dr. Nosanchuk is a licensed physician with forty (40) years of experience, including experience working in an emergency room for many years and currently in family practice and internal medicine, where he has treated people with all kinds of respiratory and gastrointestinal problems, making diagnostic decisions. (App 114a-116a).

***The force generated by a cough or vomiting is substantial because the diaphragm pushes everything down.*** At least that's my interpretation.

I think that once you start bleeding, it's going to cause problems – probably within 24 hours, maybe 48. Because the abdominal contents are not real happy when there is free blood in them. The lining of the abdomen does not like blood...

Q. So is the time period that he may have been exposed to any of the fumes even relevant in your opinion?

A. Do I think that – yeah, of course. I do think that if he coughed violently it could happen on the first day. Maybe, but if he coughed and vomited and it continued over a long period of time, I think that he could have had, you know, minor micro injuries, if you want to call it that, and eventually it avulsed... As far as why it took that long, I don't know.

*Id.* (App 161a). Dr. Nosanchuk testified that, in his experience, exposure to chemical irritants, such as those present in crude oil, can cause respiratory ailments (App 157a-158a).

**C. The Trial Court improperly granted summary disposition in favor of Defendants-Appellants and the Court of Appeals reversed.**

The Trial Court, having heard the evidence presented and other cases relating the Enbridge Oil Spill, agreed that exposure to fumes can cause headaches and other discomfort. (App 236a-237a, 241a). Although the Trial Court recognized that there was a genuine issue of material fact as to whether Plaintiff-Appellee's vomiting and headaches were related to the Enbridge Oil Spill, summary disposition was erroneously granted in favor of Defendants-Appellants because the Trial Court did not believe that Plaintiff-Appellee provided evidence to "link up the etiology of ruptured aorta [sic]," despite Dr. Nosanchuk's direct testimony on the issue. (App 243a).

Lowery appealed the ruling to the Michigan Court of Appeals (App 1a). The Court of Appeals majority agreed that Lowery had established genuine issues of fact for trial, without the assistance of an expert in toxicology, and remanded the case to the Trial Court. (App 249a-251a). Citing to *Genna v Jackson*, 286 Mich App 413, 781 NW2d 124 (2009), the Court of Appeals majority correctly found that "direct expert testimony that the toxin was the cause of plaintiff's

injury was not required to prove causation in a toxic tort case.” (App 250a). Discussing the relevant facts established by Lowery, the Court of Appeals majority further properly found that “[a] plaintiff is permitted to prove his case through circumstantial evidence and reasonable inferences.” (App 251a). The Court of Appeals majority ruled that the evidence proffered by Lowery supported his theory of causation beyond mere speculation. *Id.*

Defendants-Appellants sought certiorari, which was granted by this Court to address two issues: “(1) whether the plaintiff in this toxic tort case sufficiently established causation to avoid summary disposition under MCR 2.116(C)(10); and (2) whether the plaintiff was required to present expert witness testimony regarding general and specific causation. See *Genna v Jackson*, 286 Mich App 413, 781 NW2d 124 (2009).”

### **III. SUMMARY OF ARGUMENT**

The Court of Appeals majority correctly determined that Plaintiff-Appellee’s expert’s testimony was adequate to withstand summary disposition based upon MCR 2.116(C)(10) and that “direct expert testimony that the toxin was the cause of plaintiff’s injury was not required to prove causation.” (App 250a). The facts in this case are compellingly similar to the facts in *Genna*, 286 Mich App 413, which would allow Plaintiff-Appellee “to prove his case through circumstantial evidence and reasonable inferences.” (See App 251a, citing *Genna*, 286 Mich App at 421).

Plaintiff-Appellee did provide substantial evidence to support his theory of causation. There was extensive testimony in regards to the horrendous fumes which emanated from the Enbridge Oil Spill. Enbridge even admits that VOCs were released in the air near Plaintiff-Appellee’s home. Exposure to the VOCs that are commonly found in crude oil cause the common symptoms, including headaches, nausea and vomiting, suffered by Plaintiff-Appellee. Plaintiff-Appellee also provided evidence that would negate the likelihood that Lamictal or Vicodin were the causes of his headaches or vomiting. Plaintiff-Appellee’s medical expert, Dr. Nosanchuk,

provided reliable testimony, supported by medical and scientific literature, that links the vomiting to the rupture of Lowery's short gastric artery. There is also expert testimony from Plaintiff-Appellee's treating physician about the difference between Lowery's injury and Malory-Weiss Syndrome, known to be caused by vomiting, and Lowery's short gastric artery rupture being that the former occurs inside the stomach and the latter occurred outside the stomach. This evidence further lends to the reliability of the expert's finding. The Court of Appeals majority properly found that this evidence and reasonable inferences made therefrom create "a strong enough logical sequence of cause and effect for a jury to reasonably conclude that [Lowery's] exposure to oil fumes caused his vomiting, which ultimately caused his short gastric artery to rupture." (App 251a).

As stated, Plaintiff-Appellee's expert's testimony was reliable. Notwithstanding, however, any grant of summary disposition that turned on the expert's credibility was improper. Any grant of summary disposition that turned on the expert's lack of reliability was premature. The Trial Court never ruled on the issue of reliability because Defendants-Appellants never sought a *Daubert* hearing to challenge the expert's testimony. Even if this Court concludes that there may be issues with reliability of Dr. Nosanchuk's testimony, there is an insufficient record for a determination by this Court, as Plaintiff-Appellee is entitled to an evidentiary hearing on the matter. As such, reversal of the Trial Court's grant of summary disposition is still proper, and the matter should be remanded for to the Trial Court.

#### **IV. LEGAL ARGUMENT**

##### **A. Standard of Review: MCR 2.116(C)(10)**

A trial court's grant or denial of a motion or summary disposition brought pursuant to MCR 2.116(C)(10) is subject to de novo review at the appellate level. Pursuant to MCR 2.116(C)(10),

summary disposition is only proper if, “except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.” MCR 2.116(C)(10). “In evaluating a motion for summary disposition brought under [MCR 2.116(C)(10), a trial court considers the affidavits, pleadings, depositions, admissions and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion.” *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999).

“The court is not permitted to assess credibility, or to determine facts on a motion for summary judgment.” *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Rather, the court is required to determine whether any genuine issue of material fact warrants trial based upon a review of “the record evidence, and all reasonable inferences therefrom.” *Id.* “To determine if a genuine issue of material fact exists, the test is ‘whether the kind of record which might be developed, giving the benefit of reasonable doubt to the opposing party, would leave open an issue upon which reasonable minds might differ.’” *Id.*, quoting *Farm Bureau Mut Ins v Stark*, 437 Mich 175, 184-185; 468 NW2d 498 (1991).

Under MCR 2.116(C)(10), regarding material facts, the Court should be liberal in finding a dispute. *Porter v City of Royal Oak*, 214 Mich App 478; 542 NW2d 905 (1995). If the evidence is conflicting, summary disposition is improper. *Barnell v Taubman Co*, 203 Mich App 110; 512 NW2d 13 (1993). “Before summary disposition may be granted, the court must be satisfied that it is *impossible* for the claim asserted to be supported by evidence at trial.” *Arbelius v Poletti*, 188 Mich App 14, 18; 469 NW2d 436 (1991) (emphasis added).

It is also clear that that summary disposition under MCR 2.116(C)(10) is particularly disfavored when a witness’ credibility is crucial. *Harrison v Olde Fin Corp*, 225 Mich App 601; 572 NW2d 679 (1997). Issues of credibility are not matters to be determined by the court at

summary disposition. *Arbelius*, 188 Mich App at 18. Specifically, when the truth of the material factual assertion of a moving party's argument depends on credibility, there exists a genuine issue to be decided at trial by the trier of fact and the motion for summary disposition cannot be granted. See *SSC Assoc Ltd P'ship v General Retirement System*, 192 Mich App 360, 365; 480 NW2d 285 (1991), *sub app* 210 Mich App 449, 452; 534 NW2d 160 (1995) (appellate court gives "defer[erence] to the trial court's credibility determination regarding the expert witnesses").

**B. Lowery was not required to present direct expert testimony regarding general and specific causation.**

It is not disputed that Plaintiff-Appellee was required to establish both general and specific causation. However, Michigan law does not require that a plaintiff establish causation through direct expert testimony. *Genna v Jackson*, 286 Mich App 413. Where the status of Michigan law allows a plaintiff to avoid summary disposition by establishing causation through evidence that goes beyond mere speculation and creates *reasonable inferences of causation*, *Skinner*, 445 Mich at 161 (emphasis added), requiring direct expert testimony would result in a change in the law. Even Defendants-Appellants agree that there are certain instances, like those in *Genna*, where expert testimony is not required. In this case, much like that in *Genna*, there was sufficient evidence to create reasonable inferences of causation.

The facts in *Genna* involve a mold claim against the defendant where the jury returned a verdict for the plaintiff who became ill allegedly due to the mold infestation. The *Genna* defendant appealed, urging the Michigan Court of Appeals to follow federal caselaw from the Western District of Michigan. *Id* at 418. In *Genna*, the Court stated as follows:

Defendant urges this court to adopt the requirement that, in order to prove causation in a toxic tort case, your Plaintiff must show both that the alleged toxin is capable of causing injuries like those suffered by the Plaintiff and human beings subjected to the same exposure as the Plaintiff, and that the toxin was the cause of Plaintiff's injury. *They urged this court to find that direct expert testimony was required to establish the causal link, not inferences.*

*Id* (emphasis added). However, the *Genna* Court, finding that “[t]here is no published case law on the subject,” “decline[d] to adopt this requirement.” *Id.*, *emphasis added*. Moreover, the Michigan Supreme Court declined to review *Genna*, thereby, also declining to adopt such requirement. See June 28, 2010 order of the Supreme Court (Docket No. 140445).

In *Genna*, like in the instant case, the only expert that the plaintiff had was a medical doctor, who was not a toxicologist, who testified, “‘a probable confounding factor is exposure to mold at home after extensive water damage.’” 286 Mich App at 421. There was evidence that two of the molds found in the *Genna* plaintiffs’ home were “known to produce toxins that can affect human health and poses safety issues.” *Id* at 416. The *Genna* Court, quoting *Gass v Marriott Hotel Services, Inc*, 558 F3d 419 (6<sup>th</sup> Cir 2009), pointed out that the “defendant has not submitted any scientific evidence that the mold in her condominium *could not* have cause [sic] plaintiffs’ injuries,” but that the defendant only provided speculation as to other causes of the plaintiffs’ injuries. 286 Mich App at 419-420 (emphasis original).<sup>10</sup>

Like in *Genna*, in this case, Defendants-Appellants have not presented, and cannot present, any evidence that the chemical substances in the oil released into the Kalamazoo River, directly adjacent to Plaintiff-Appellee’s home, which created the noxious fumes inhaled by Plaintiff-Appellee, as well as his guests and neighbors, are not harmful to human health. Additionally, Defendants-Appellants only speculate as to alternative causes for Plaintiff-Appellee’s injuries, but were unable to obtain any conclusive opinion from any experts presented at the time of summary disposition to support their speculation. On the other hand, Plaintiff-Appellee presented evidence

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<sup>10</sup> Note that the *Genna* case made it through trial, and the *Genna* defendant was appealing from the trial court’s denial of defendant’s motion for a directed verdict and JNOV. 286 Mich App at 417.



that challenging those alternate theories.<sup>11</sup> There is no requirement under Michigan law that a toxic tort requires the testimony of a toxicologist to support the claim that toxins, known to be in crude oil (see App 170a-175a) caused the Plaintiff-Appellee's injuries. The Plaintiff-Appellant does have an expert (Dr. Nosanchuk) to testify his injuries in this case were caused by the toxins in the oil to which Plaintiff-Appellant was exposed as a result of the Enbridge Oil Spill.

Defendants-Appellants claim that expert testimony was required to establish that Plaintiff was exposed to sufficient amounts of VOCs from the Enbridge Oil Spill to cause his symptoms. However, as will be set forth in greater detail below, in this case, there was sufficient evidence of Plaintiff-Appellee's exposure to the toxic fumes of the Enbridge Oil Spill, much like in *Genna*, without the assistance of direct expert testimony, to establish "the requisite causal link" by "utilize[ing] circumstantial proof" and "reasonable inferences," that go "beyond mere speculation," "from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred." See *Skinner*, 445 Mich at 163-165. Because Michigan law does not require direct testimony of an expert witness to prove causation in such cases, this Court should find that Plaintiff-Appellee was not required to present additional expert witness testimony to prove causation.

Defendants-Appellants' reliance upon the non-binding cases cited in their Brief on Appeal is misplaced because those cases are all distinguishable.<sup>12</sup> In *Pluck v BP Oil Pipeline Co*, 640 F3d

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<sup>11</sup> Neither Dr. Thakur nor Dr. Nosanchuk believed that the Lamictal was the cause of Lowery's headache that lasted several days after the Enbridge Oil Spill and immediately preceded the rupture of his short gastric artery, as the drug is typically used to treat headaches. (App 95a, 146a). It is also unlikely that the Vicodin caused his vomiting, as Lowery testified that he had taken the medication on several prior occasions without any nausea or vomiting. (App 33a-34a).

<sup>12</sup> *Woodard v Custer*, 473 Mich 1; 702 NW2d 525 (2005), is clearly distinguishable because medical malpractice cases in Michigan require expert testimony to establish negligence, "particularly in demonstrating the applicable standard of care." *Id* at 6. Here, negligence has already been determined.

671 (CA 6, 2011), the plaintiff sought damages for exposure to Benzene which she alleged caused her to suffer from Non-Hodgkins lymphoma. *Id* at 674. The *Pluck* trial court, on motion in limine, excluded the plaintiff's testimony on causation, because of a lack of evidence of the dose which could have caused the plaintiff's lymphoma. *Id* at 675. The plaintiff in *Higgins v Koch Development Corp*, 794 F3d 697 (CA 7, 2015), claimed that he developed long term medical conditions as a result of his exposure to chlorine, one year after the exposure,<sup>13</sup> including reactive airways dysfunction and chronic asthma. *Id*. The plaintiff in *Wills v Amerada Hess Corp*, 379 F3d 32 (CA 2, 2004), claimed to have developed squamous cell carcinoma (a form of skin cancer) as a result of exposure to toxic substances. *Id*. All of these cases involve long-term diseases developed as a result of exposure to toxic substances.

Here, Plaintiff-Appellee sustained injuries about three weeks after the initial rupture of Enbridge's Line 6B that dumped about 840,000 of Canadian tar sands, heavy crude oil into the Kalamazoo River near Plaintiff-Appellee's home. Lowery suffered from common reactions (coughing and vomiting) to known irritants that was ongoing for such a period, due to his continued exposure to those irritants, that ultimately resulted in the tearing of his gastric artery. His injuries occurred while he was still being exposed to the fumes, which is evidence by witness testimony of the "horrendous" tar-like odor in the area at the time. Moreover, Plaintiff-Appellee does not complain of a long-term disease that was developed, but injuries from a common reaction to the irritants, coughing and vomiting, that continued for an extended period of time, ultimately causing his gastric artery to rupture under the pressure of all the coughing and vomiting. Although it may be necessary for a toxic tort plaintiff to provide expert testimony that he was exposed to a sufficient

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<sup>13</sup> In the instant case, Plaintiff-Appellee suffered his injuries while he was being exposed to the fumes from the Enbridge Oil Spill, not one year later.

level of a toxic substance to develop a long-term disease, such as cancer or asthma, it does not require an expert to explain that an individual may cough and vomit as a result of inhaling fumes from crude oil. This is something within the common understanding of the average juror. It is also easily understood by the average juror that an extended bout of coughing and vomiting, lasting several days, such as that suffered by Plaintiff-Appellee, could result in the tearing of the short gastric artery, especially where Plaintiff-Appellee's treating physician, Dr. Kosiarski testified that this type of injury is typically the result of trauma (App. 29b-30b) and where Dr. Nosanchuk testified that coughing and vomiting causes "the violent displacement of intra-abdominal organs," "because the diaphragm pushes everything down" and that the short gastric artery is a relatively short artery that goes with the greater curvature of the stomach. (App 161a).

*Rink v Cheminova, Inc*, 400 F3d 1286 (CA 11, 2005), is a products liability case involving a chemical pesticide which the plaintiffs claim "malfunctioned," causing them injury. The plaintiffs claimed that the pesticide went through a chemical reaction, caused by exposure to temperatures over 77 degrees, that changed the pesticide into a chemical that was claimed to be toxic to humans. *Id.* The testimony of the plaintiffs' expert witness, regarding the exposure of the pesticide to the threshold temperatures, was not allowed after a five-day *Daubert* hearing.<sup>14</sup> *Id.* at 1290. That court found that without an expert's testimony the plaintiffs could not prove the levels of harmful chemicals in the pesticide at the time it was dispersed or the level at which the pesticide becomes "defective, i.e. toxic to humans." *Id.* at 1291. While expert toxicologist testimony in that case would be helpful for the jury to understand the chemical changes in the pesticide and whether the pesticide had changed enough to cause harm to the plaintiffs, in the instant case, there was

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<sup>14</sup> In this case, Plaintiff-Appellee's expert was never subjected to a *Daubert* hearing.

enough evidence,<sup>15</sup> without the assistance of an expert toxicologist, for a jury to understand that the fumes from heavy crude oil<sup>16</sup> could and did cause Plaintiff-Appellee's extended bout of coughing and vomiting that lead to the avulsion of his gastric artery.

Defendants-Appellants' reliance upon *Nelson v American Sterilizer Co*, 223 Mich App 485, 489; 566 NW2d 671 (1996) is misplaced. That case involved dismissal of a plaintiff's claims after the plaintiffs' experts were excluded after an evidentiary hearing. *Id*. In that case, the Michigan Court of Appeals reversed the dismissal by the trial court, finding that it "acted prematurely," and remanded to determine whether the experts were qualified to testify on causation of some of the plaintiffs' symptoms where there was "scientific literature relied upon by the parties" that supported a causal link between the plaintiffs' exposure to EtO and those symptoms. *Id* at 499. Similarly, in this case, Plaintiff-Appellee's expert, Dr. Nosanchuk did present scientific literature supporting a causal link between Plaintiff's vomiting and his ruptured gastric artery (see App 99b-102b) and documentation that exposure to VOCs contained in the heavy crude oil from the Enbridge Oil Spill causes nausea and vomiting. (App 170a-175a). Based upon *Nelson*, the Trial Court's grant of summary disposition in this case was, at the very least, premature.<sup>17</sup>

*Schnexnayder v Exxon Pipeline Co*, 815 So2nd 156, (La App, 2005), is also distinguishable because, unlike in this case, the *Schnexnayder* plaintiffs had not been treated for any of their

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<sup>15</sup> Plaintiff-Appellee presented evidence that the VOCs cause coughing and nausea (App 170a-175a) and, as set forth in the statement of facts above, that the fumes from the Enbridge Oil Spill were still emanating at the time of his injuries.

<sup>16</sup> There is no dispute that the Enbridge Oil Spill released VOCs near Plaintiff-Appellee's home.

<sup>17</sup> In *In re Paoli RR Yard PCB Litigation*, 916 F2d 829, 838 (CA 3, 1990), relied upon by Defendants-Appellants, (see Defendants-Appellants' Brief on Appeal, p. 18, FN14), the Third Circuit US Court of Appeals found that there was a procedural failure in the trial court's ruling that "not only failed to give plaintiffs an adequate opportunity to present their factual and legal contentions on evidentiary issues, but it also ruled on an inadequate factual record and it failed adequately to articulate the bases for its rulings." *Id* at 835.

alleged physical injuries and did not present *any* expert testimony to establish causation, where the defendants did provide expert testimony that supported that there was no causal link. *Id* at 159-160. Here Plaintiff-Appellee was treated for his injuries and did provide expert testimony to link up the etiology of his injuries to his exposure to the Enbridge Oil Spill, and Defendants-Appellants did not produce any expert to support that there was no causal link.

In *Genna*, there was evidence that two of the molds found in the plaintiffs' home were "known to produce toxins that can affect human health and poses safety issues." *Id* at 416. Here, there is evidence of the crude oil from the Enbridge Oil Spill near Plaintiff-Appellee's home, evidence of the smell from the fumes emanating from the Enbridge Oil Spill at the time of Plaintiff-Appellee's injuries and evidence that the crude oil contains at least three harmful irritants that cause the symptoms from which Plaintiff-Appellee was suffering. Moreover, Defendants-Appellants admit that the heavy crude oil was emitting VOCs.<sup>18</sup>

Despite Defendants-Appellants' attempt to distinguish the case, the facts in this case are very much like those in *Genna*. Like in the instant case, in *Genna*, the only expert that testified regarding causation was a medical doctor, who was not a toxicologist, who testified, "'a probable confounding factor is exposure to mold at home after extensive water damage.'" 286 Mich App at 421. The *Genna* plaintiffs suffered from symptoms which are commonly related to mold exposure and improved after they were removed from the exposure. *Id*. Here, Plaintiff-Appellee presented Dr. Nosanchuk's testimony, which is set out in greater detail in the statement of facts above and in the arguments below, that Plaintiff-Appellee's injuries were, within a reasonable degree of

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<sup>18</sup> Defendants-Appellants' request that this Court take judicial notice that air sampling measurements were being taken in the area at the time of Plaintiff-Appellee's injuries is improper, as this was not introduced in the Trial Court, and this Court's scope of review is limited to the evidence presented to the Trial Court. Notwithstanding, Plaintiff-Appellee was not required to present actual air sampling measurements.

medical certainty, caused by his exposure to the fumes of the Enbridge Oil Spill. Plaintiff suffered from symptoms which are commonly suffered as a result of exposure to the VOCs in the crude oil released during the Enbridge Oil Spill. (App 170a-175a). Plaintiff's condition improved after he was released from the hospital because the fumes were gone. (App 35a).

In *Genna v Jackson*, 286 Mich App 413; 781 NW2d 124 (2009), *lv den* by order of the Supreme Court entered June 28, 2010 (Docket No. 140445), the Michigan Court of Appeals, finding no Michigan caselaw on the subject, declined "to adopt a requirement that, in order to prove causation in a toxic tort case, a plaintiff must show both that the alleged toxin is capable of causing injuries like those suffered by the plaintiff in human being subjected to the same exposure as the plaintiff, and that the toxin was the cause of the plaintiff's injury.... [or] to find that direct expert testimony is required to establish the causal link, not inferences." *Id.* at 418. This case involves the identical issue where a toxic tortfeasor is attempting to raise the evidentiary threshold to require an injured plaintiff to prove causation only through the expert testimony of a toxicologist. The Michigan Supreme Court declined to review the Court of Appeals decision in *Genna*, maintaining the law in Michigan which would not require expert testimony to prove general and specific causation in toxic tort cases where a reasonable inference of causation can be made based upon the evidence presented. By following the ruling in *Genna*, the Court of Appeals majority's holding, declining to require additional expert testimony on causation, conforms with Michigan law and should be upheld.

**C. Lowery sufficiently established causation to avoid summary disposition under MCR 2.116(C)(10).**

As further discussed below, the Court of Appeals majority correctly determined that genuine issues of material fact existed, sufficient to defeat a motion for summary disposition brought pursuant to MCR 2.116(C)(10). The majority's opinion was consistent with published

caselaw in *Genna*, 286 Mich App 413. There was sufficient evidence of Lowery's exposure to the VOCs from the Canadian tar sands, heavy crude oil dumped by Defendants-Appellants into the Kalamazoo River near Lowery's home, and Lowery was not required to rule out other potential causes of his injuries. attempts to introduce new facts are beyond the scope of this Court's review. *Skinner*, 445 Mich at 161-162. To the extent that reliability of Plaintiff-Appellee's expert's reliability is at issue, since there was no determination under *Daubert* on that issue, that is also beyond the scope of this Court's review.

**1.A plaintiff in a toxic tort case may present evidence of exposure to a toxic substance without providing air sampling measurements where it is commonly known that any exposure can cause the plaintiff's symptoms.**

As will be explained in more detail in the next section, Plaintiff-Appellee presented extensive evidence of his exposure to the toxic fumes emanating from the Enbridge Oil Spill. Defendants-Appellants, attempting to introduce new evidence beyond the scope of this Court's review, claim that Plaintiff-Appellee was required to present air sampling measurements to establish that he was exposed to sufficient levels of VOCs to cause his symptoms. However, like in *Genna*, Plaintiff-Appellee was able to establish this through other evidence. The opinion in *Curtis v M & S Petroleum, Inc*, 174 F3d 661 (CA 5, 1999), cited by Defendants-Appellants in their brief, indicates that establishing the exact parts per million or parts per billion of exposure to certain toxins is only one of various ways that a plaintiff can evidence exposure at levels sufficient to cause his symptoms. *Id* at 671. Other means which the *Curtis* court found to be reliable evidence is a plaintiff suffering from "commonly known symptoms" of exposure soon after an event where there would be potential for exposure (in that case, where a refinery began processing a new product containing high levels of benzene or, as in this case, where there was a catastrophic spill

of heavy crude oil containing high levels of Toluene, Benzene and Xylene, near Lowery's home); or where there is an event that makes exposure highly likely. *Id.*

In *Genna*, there was evidence that two of the molds found in the plaintiffs' home were "known to produce toxins that can affect human health and poses safety issues." *Id.* at 416. Here, there is evidence of the crude oil from the Enbridge Oil Spill near Plaintiff-Appellee's home, evidence of the smell from the fumes emanating from the Enbridge Oil Spill and evidence that the crude oil contains at least three harmful irritants that cause the symptoms from which Plaintiff-Appellee was suffering. Moreover, Defendants-Appellants admit that the heavy crude oil was emitting VOCs.<sup>19</sup>

**2.Plaintiff-Appellee presented sufficient evidence of exposure to the noxious fumes emanating from the Enbridge Oil Spill to cause his symptoms.**

Plaintiff presented extensive evidence that he was exposed to the noxious fumes emanating from the Enbridge Oil Spill. there is substantial evidence of Plaintiff-Appellee's exposure to the harmful fumes emanating from the Enbridge Oil Spill, including, but not limited to: a) evidence that Plaintiff-Appellee lived within yards of the Kalamazoo River and a site of the Enbridge Oil Spill and was home for, at the very least, significant periods of time immediately after the spill, visited the river and saw the oil, smelled the fumes around and inside his home; b) extensive witness testimony regarding the pervasive smell of the fumes in and around Plaintiff-Appellee's home, including, deposition testimony of neighbors and visitors, which provide that the chemical smell emanating from the Enbridge Oil Spill lingered in the area, and specifically at Plaintiff-

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<sup>19</sup> Defendants-Appellants' request that this Court take judicial notice that air sampling measurements were being taken in the area at the time of Plaintiff-Appellee's injuries is improper, as this was not introduced in the Trial Court, and this Court's scope of review is limited to the evidence presented to the Trial Court. Notwithstanding, Plaintiff-Appellee was not required to present actual air sampling measurements.



Appellee's home, at the time of Plaintiff-Appellee's injuries; c) admission by Defendants-Appellants that nearly one million gallons of crude oil from Line 6B flowed into the Kalamazoo River from the point of the rupture, which was approximately eleven miles upstream from Plaintiff-Appellee's home, to forty miles downstream from the point of rupture; d) the undisputed fact that a voluntary evacuation of the area where Plaintiff-Appellee's home was located was called; e) witness testimony that cleanup crews in the area were wearing full Hazmat suits, including air masks; f) deposition testimony from neighbors living very close to Plaintiff-Appellee who suffered similar symptoms; g) the NIOSH Guides on the harmful effects of the organic compounds found in the heavy crude oil dumped into the Kalamazoo River near Plaintiff-Appellee's home from the Enbridge Oil Spill; and Defendants-Appellants' own admission that VOCs were released into the air from the heavy crude oil dumped in the Enbridge Oil Spill. Even the Trial Court agreed that it had seen other cases where it found that the Enbridge Oil Spill did cause headaches and vomiting and agreed that Plaintiff-Appellee did present sufficient evidence of exposure to the chemical irritants released from the Enbridge Oil Spill to create a genuine issue of fact to go to trial, at least so far as Plaintiff's symptoms of coughing and vomiting are related. (App 241a, 243a).

The Federal Sixth Circuit's ruling in *Gass*, 558 F3d 419, is guiding here. In the *Gass* case, the "plaintiff testified that there was a 'thick, horrid, acrid, putrid, odor' in the room that the 'haze of chemicals in the room was so thick that she could 'see it, smell it, taste it, [and] feel it.'" *Id* at 422. The *Gass* plaintiffs "began to fill [sic] sick immediately after their exposure and later endured symptoms that were consistent with exposure to the neurotoxins in pesticides." *Id* at 422-424. That court found that there was sufficient evidence of exposure. In this case, much like in *Gass*, Plaintiff presented testimony regarding the smell of the oil in and near Plaintiff-Appellee's home

around the time of his injuries. “I’d smelled it before they even knew about it... I went back to the house probably within that 24 hours [of seeing the oil spill near the point of rupture on or about the date of the Line 6B rupture] I could smell it and it was profusely strong... within that 24 hours I could smell it extremely strong. It was toxic smelling. That’s when I seen it on the news that night that basically the oil spill had hit.” (App 32a). “The only thing I can compare it to is if maybe if you were like driving down a road that’s freshly getting tarred and graveled and how strong the asphalt smell is, imagine that like 8, 10 times stronger.” *Id.* “The smell was just so toxic.” (App 33a). As set forth above, Plaintiff-Appellee also testified that he began having symptoms consistent with exposure to the volatile organic compounds found in crude oil. (App 33a-34a).

Defendants-Appellants reliance upon *Curtis*, 174 F3d 661, is misplaced because the ruling in that case supports that Lowery provided sufficient evidence of exposure. The *Curtis* court found that there was ample evidence of over-exposure to benzene,<sup>20</sup> where, among other things, “the plaintiffs experienced a cluster of ‘well-known symptoms of overexposure to benzene’ soon after the refinery began processing a new product containing high levels of the chemical.” *See Defendants-Appellants Brief on Appeal*, p. 28, citing *Curtis*, 174 F3d at 671. The expert in that case also relied on evidence that exposure was likely. The facts in this case are almost identical. Plaintiff-Appellee presented evidence that he began suffering from well-known symptoms of overexposure to Toluene, Benzene and Xylene (which are known to be contained in crude oil), including coughing, headaches, nausea and vomiting, soon after the Enbridge Oil Spill. Additionally, Defendants-Appellants admit that VOCs were emitted from the Enbridge Oil Spill and do not dispute that Plaintiff-Appellee lived very close to the River where the spill occurred,

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<sup>20</sup> One of the chemical constituents known to be contained in heavy crude oil that Plaintiff-Appellee claims was a cause of his injuries.

which makes it likely that Lowery was exposed to the VOCs. This is information relied upon by Dr. Nosanchuk. The only one of the three pieces of evidence that the *Curtis* plaintiffs had that Lowery did not was evidence of ppm of benzene. However, by stating that the evidence was “**amply support**[ed],” the *Curtis* court seemed to indicate that evidence of any one or more of those facts would be sufficient to satisfy the burden of establishing exposure. *Id* at 672 (emphasis added).

**3.Plaintiff-Appellee presented sufficient evidence to lead to a reasonable inference of causation to overcome a motion for summary disposition.**

As noted, the Plaintiff’s expert witness, Dr. Jerry L. Nosanchuk, a physician of over forty (40) years of experience treating patients with all sorts of medical situations, clearly testified that it was his opinion, to a reasonable degree of medical certainty, that Plaintiff-Appellee’s extreme vomiting, headaches and nausea were caused by the noxious fumes emanating from the oil spill, and that the resulting imbalance in his abdominal area led to the avulsion of his short gastric artery, thus requiring the life-saving emergency surgery that Plaintiff-Appellee underwent.

The treating surgeon, Dr. Kosiarski, testified that he did not know and would not give an opinion as to what the cause of the repair of the short gastric artery suffered by Plaintiff-Appellee. (App 66a). Actually, Dr. Kosiarski told Plaintiff-Appellee that the only cause that he could think of would be trauma, but found no indication that Plaintiff-Appellee’s condition was caused by any trauma. (App 108b-109b). At deposition, Plaintiff-Appellee testified that did not suffer any trauma at the time of the Enbridge Oil Spill and the avulsion of his gastric artery was only preceded by the intense migraine headache and severe vomiting. (App 112b). Defendants-Appellants erroneously alleged that the medication that Plaintiff-Appellee was taking for his depression, Lamictal, caused the problem, but the treating psychiatrist “scotched” that theory when she testified that Lamictal instead of causing headaches, actually prevented headaches. (App 146a).

Although Plaintiff-Appellee had a history of migraine headaches, he testified that he never had headaches to the extent that he had after the oil spill and was clear in his testimony that the intense chemical smells from the oil spill caused him to become ill and resulted in his surgery. *Id.* As set forth above, Plaintiff-Appellee's expert, Dr. Nosanchuk testified to the same result. (App 95a). Defendants-Appellants also claimed that Vicodin, taken by Lowery within the day or two prior to the avulsion of his short gastric artery, may have triggered Plaintiff-Appellee's vomiting because he was afraid to take Vicodin immediately after the surgery. However, Plaintiff-Appellee testified that he had taken Vicodin "plenty of times" before the incident, without it "mak[ing his] stomach upset." (App 33a-34a).

The evidence presented by Plaintiff-Appellee satisfied the threshold burden of general and specific causation for a toxic tort case, as set forth in *Genna v Jackson*, 286 Mich App 413. To the extent that Defendants-Appellants challenge Dr. Nosanchuk's credibility, such determination would properly be made by a trial court, but was not in the instant case. *SSC Assoc Ltd P'ship*, 210 Mich App at 452. Moreover, Dr. Nosanchuk's testimony should not be dismissed where his reliability has not been challenged at a *Daubert* hearing. See *Nelson*, 223 Mich App 485; see also *In re Paoli RR Yard PCB Litigation*, 916 F2d 829.

In the instant case, there is no question that the volatile chemicals in crude oil in sufficient quantities can cause health problems in humans. Moreover, coughing, headaches, nausea and vomiting are common symptoms of over-exposure to the VOCs found in crude oil. (App 170a-175a). See *Curtis*, 174 F3d 661. For Defendants-Appellants to debate the harmful effects of exposure to the toxic fumes which emanated from the Enbridge Oil Spill, let alone to claim a requirement of expert toxicologist testimony as to this fact, is completely disingenuous, especially considering that their own employees protected themselves from the chemical irritants found in

the crude oil released during the Enbridge Oil Spill by wearing full Hazmat suits, including respirators. (App 176a-179a). Like the harmful effects of the mold in *Genna*, it is a well-known fact that exposure to the chemical irritants in the crude oil released during the Enbridge Oil Spill causes coughing, headaches, nausea and vomiting. The NIOSH Pocket Guides for three of the chemicals contained in the oil released during the Enbridge Oil Spill provided that these chemical irritants cause coughing, headaches, nausea and vomiting. (App 170a-175a). The Trial Court agreed that there was sufficient evidence to go to trial on this issue. (App 241a-243a). Plaintiff-Appellee evidenced his exposure with testimony of witnesses about the fumes and smell from the Enbridge Oil Spill and tied his symptoms of the coughing and vomiting to the rupture of his gastric artery through the testimony of Dr. Nosanchuk, who testified that “the violent displacement of intra-abdominal organs,” which occurred during the episodes of coughing and vomiting “because the diaphragm pushes everything down,” caused the artery to detach. (App 161a). Dr. Nosanchuk’s testimony is helpful to lead the finder of fact to determine that there was a causal connection between the exposure to the fumes and the ultimate avulsion of Lowery’s short gastric artery. (See App 249a-250a).

Moreover, as set forth above, based upon the testimony of Dr. Thakur and Dr. Nosanchuk, it is unlikely that the Lamictal was the cause of Lowery’s headache that lasted several days after the Enbridge Oil Spill and immediately preceded the rupture of his short gastric artery, as the drug is typically used to treat headaches. (App 95a, 146a). It is also unlikely that the Vicodin caused the vomiting, as Lowery testified that he had taken the medication on several prior occasions without any nausea or vomiting. (App 33a-34a). Although Defendants-Appellants proposed that the Lamictal and/or the Vicodin may have been plausible alternative theories, there is substantial evidence that these were not the cause and that “indicat[e] a logical sequence of cause and effect”

that points to Plaintiff-Appellee's theory of causation: the Enbridge Oil Spill caused him to suffer from common symptoms of exposure to the VOCs contained in the crude oil, which ultimately led to the rupture of his short gastric artery. *See Skinner*, 445 Mich at 164-165.

As such, Plaintiff-Appellee did provide sufficient evidence to create a genuine issue of material fact to avoid summary disposition. Defendants-Appellants arguments that Dr. Nosanchuk's testimony was not credible and/or unreliable are just red herrings because Defendants-Appellants never requested a *Daubert* hearing and any grant of summary disposition, turning on Dr. Nosanchuk's credibility, was improper, or turning on his reliability, was premature.

**4. Notwithstanding that there is an insufficient record for review under *Daubert*, Plaintiff-Appellee's medical expert's testimony was reliable.**

Plaintiff-Appellee's medical history, including the history regarding the Lamictal, was available to Dr. Nosanchuk, as was Lowery's deposition transcript, prior to Dr. Nosanchuk's July 9, 2013 Record Review and Opinion. (App 107a-113a). Dr. Nosanchuk listed the documents he reviewed prior to providing his opinion, as follows:

1. Medical records of Battle Creek Health Systems for Chance Lowery covering the period from August 18, 2010 until discharge date of August 20, 2010. Included in these records are the operative report of the surgeon, John D. Koziarski, M.D., as well as a two page psychiatric consultation note from Anoop Thakur, M.D.
2. A government document issued by the Michigan Department of Community Health entitled "Acute Health Effects of the Enbridge Oil Spill" dated November, 2010.
3. A newspaper report from the Detroit Free Press entitled "State Report Backs Health Complaints near Oil Site."
4. A complete copy of the transcript of the deposition of Chance Lowery taken on May 25, 2012 including exhibits attached thereto.
5. Medical records obtained on Chance Lowery from Summit Pointe. Note: I paid particular attention to the records dated June 24<sup>th</sup>, October 28<sup>th</sup>, and February 11, 2010 and February 25<sup>th</sup>, August 3<sup>rd</sup>, June 1<sup>st</sup> and May 26, 2009.

6. Photos reportedly of the back yard of the house showing proximity to the Kalamazoo River.
7. Interrogatory answers by Plaintiff, Chance Lowery, dated March 5, 2012 and specifically interrogatory answer No. 12.

(App 107a-108a). At his deposition, Dr. Nosanchuk testified that he had been treating patients for over forty (40) years, further testifying that during that time, he had treated patients with respiratory problems. Particularly relevant, Dr. Nosanchuk testified, as follows:

I treat asthma, I treat obstructive lung disease. I see patients who get in a lot of trouble with anything from smoke inhalation to perfume to bathroom sprays to oven cleaners to allergies and other irritants and I have treated them...

(App 159a). He testified that he had reviewed the abstracts of several journal articles which provided a basis for his opinion and produced copies of two of those journal abstracts. (App 161a) (see also App 99b-102b). Based upon all of the above factors, Dr. Nosanchuk was able to reasonably apply his clinical judgment to rule out any of the other alternate theories of causation and reliably determine, within a reasonable degree of medical certainty, that Lowery's exposure to the fumes of the Enbridge Oil Spill caused his injuries. (App 107a-113a).

Defendants-Appellants never requested a *Daubert* hearing to challenge the reliability of Plaintiff-Appellee's expert's testimony. Rather, they make conclusory statements that Dr. Nosanchuk's findings are unreliable. In making these erroneous conclusions, they rely upon caselaw where each of the plaintiffs' experts were subject to evidentiary hearings to determine reliability, which was not the case here. *See Pluck*, 640 F3d 671 (appeal challenging the district court's grant of defendant's motion *in limine* to exclude testimony of specific causation expert, leading to dismissal); *see also Nelson*, 223 Mich App 485<sup>21</sup> (appeal following grant of defendants motion *in limine* to exclude the testimony of plaintiff's two expert witnesses, leading to dismissal).

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<sup>21</sup> Prior case history: *Nelson v. American Sterilizer Co*, 212 Mich App 589; 583 NW2d 80 (1995), vacated in part by 453 Mich. 943, 453 Mich. 946, 554 N.W.2d 898 (1996).

The Michigan Rules of Evidence provide that expert testimony may be received into evidence “subject to the condition that the factual bases of the opinion be admitted in evidence hereafter.” MRE 703. Furthermore, “[t]he expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise.” MRE 705. It is the trial court that a record of the evidence is to be developed, and dismissal where a record may be developed is improper. The purpose of an evidentiary hearing on the admissibility of an expert witness is to allow the court to gather sufficient evidence to make a determination of whether the expert’s testimony is reliable. That did not happen in this case.

In *Nelson*, there was a three-day evidentiary hearing on the admissibility of experts’ testimony. 223 Mich App at 593. The evidentiary hearing provided a part of the basis for the review by the appellate court. *Id.*<sup>22</sup> After remand from the Michigan Supreme Court, the Michigan Court of Appeals found that dismissal of the plaintiff’s action in its entirety was premature, where “medical and scientific literature relied upon by the parties [did] recognize” a causal link between exposure to the chemical toxin and the symptoms complained of by the plaintiff. *Id.* at 499. Similarly, in this case, there is medical and scientific literature that supports the causal link between Plaintiff-Appellee’s symptoms of headaches, nausea and vomiting to his exposure to the fumes from the crude oil (App 170a-175a) and the rupture of Lowery’s short gastric artery to the vomiting which was caused by his exposure to the fumes (App 99b-102b). This evidence clearly supports the reliability of Plaintiff-Appellee’s expert’s testimony. Any ruling by the Trial Court that turned on the credibility of Dr. Nosanchuk’s testimony was improper, and any grant of

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<sup>22</sup> Similarly, in *Rink*, 400 F3d 1286, a five-day evidentiary hearing was held on the admissibility of expert testimony, upon which the appellate court had some basis for review.



summary disposition that turned on the expert's credibility was improper or, at the very least, premature.

**5. There was sufficient evidence to lead a jury to conclude that the rupture of Lowery's gastric artery was a result of the coughing, nausea and vomiting caused by exposure to the oil fumes.**

Notwithstanding that testimony of an expert toxicologist is not required in this case, as set forth above and as set forth in the November 4, 2013 Hearing Transcript on Defendants-Appellants' Motion for Summary Disposition, Plaintiff-Appellee did present sufficient evidence to create a genuine issue of material fact of causation in regards to his symptoms of headaches, nausea and vomiting. (App 241a-243a). Furthermore, Plaintiff-Appellee provided the testimony of a medical expert, Dr. Nosanchuk, to "link up the etiology" of the coughing and vomiting to the ruptured gastric artery. Dr. Nosanchuk specifically explained, as follows:

The literature talks mostly about vomiting.... But I also think the coughing is important, too. ***Basically what happens is with a cough and vomiting, there is a violent displacement of intra-abdominal organs, specifically the spleen because the short gastric artery is attached.*** ... It runs from the – it comes off the splenic artery ... They go to the greater curvature of the stomach. What's different about it ... That is a relatively short area. ***If there's a violent displacement, it's more likely injured than a longer artery which has the ability to flex or straighten out. It's a shorter artery, these are relatively shorter arteries. The force generated by a cough or vomiting is substantial because the diaphragm pushes everything down.***

(App 161a, emphasis added). Dr. Nosanchuk further explained in his written opinion, as follows:

What Chance Lowery had the surgery for was not, per se, Mallory Weiss Syndrome or a Mallory Weiss Tear. That being said, based upon the history as taken by the doctors in this case and as given by Chance Lower, it is clear to me that the cause of the tear was the frequent, violent and uncontrollable bouts of coughing and vomiting. The coughing and vomiting resulted in precipitous changes in intra abdominal organs which ultimately caused the tear or rupture of the short gastric artery. There is nothing else in the patient's history or medical record to suggest a cause other than the violent coughing and vomiting. The similarity between the arterial injury experienced by Mr. Lowery and a Mallory Weiss Tear is that they are both conditions that are caused by violent changes in intra abdominal pressure as would be caused by violent coughing and vomiting.

(App 112a).<sup>23</sup> Dr. Nosanchuk's explanation in this case provides a sufficient basis for a jury to make reasonable inferences of causation. *See Skinner*, 445 Mich at 161. Dr. Nosanchuk's expert testimony<sup>24</sup> was never subjected to an evidentiary hearing to determine reliability, but, notwithstanding and as set forth above, was reliable.<sup>25</sup> As discussed in more detail above, Plaintiff-Appellee further provided evidence that made Defendants-Appellants alternate theories of causation unlikely. For these reasons, there were genuine issues of material fact on the issue of causation to present to a jury. As such, the Court of Appeals properly reversed the Trial Court's grant of summary disposition.

## V. CONCLUSION AND RELIEF REQUESTED

The law in Michigan does not require Plaintiff-Appellee to present direct expert testimony to establish causation, as such evidence may, under certain circumstances, such as those in this case, be established through evidence which leads to reasonable inferences of causation. Moreover, Plaintiff-Appellee has established sufficient evidence, in this case, to avoid a grant of summary disposition. Where any grant of summary disposition turned on Plaintiff-Appellee's expert's reliability, such grant was premature where the expert's testimony was not subjected to a *Daubert* hearing, or where it turned on the expert's credibility, was improper.

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<sup>23</sup> Lowery's treating physician, Dr. Koziarski, also testified in regards to Mallory-Weiss Syndrome, stating that the distinguishing feature between Plaintiff-Appellee's rupture of his short gastric artery and Mallory-Weiss Syndrome is that "[a] Mallory-Weiss tear is a tear inside the stomach which causes bleeding in the stomach," while in Lowery's case, "this was bleeding outside the stomach." (App 70a). Dr. Koziarski holds board certifications, and is an expert, in general surgery and phlebology (vein disease). (App 57a).

<sup>24</sup> Rather, Defendants-Appellants alleged that Plaintiff-Appellee was required to present the testimony of an expert in toxicology to establish that Plaintiff-Appellee was exposed to sufficient amounts of the VOCs from the Enbridge Oil Spill to cause his symptoms.

<sup>25</sup> To the extent that reliability of Dr. Nosanchuk's testimony is at issue, the proper procedure would have been for Defendants-Appellants to seek a *Daubert* hearing, which they did not. Where summary disposition turned on the reliability of Dr. Nosanchuk's testimony, the proper procedure would be for this Court to remand for a *Daubert* hearing.

WHEREFORE, Plaintiff-Appellee, Chance Lowery, respectfully requests this High and Honorable Court:

- A. affirm the Court of Appeals reversal of the Trial Court's improper grant of summary disposition under MCR 2.116(C)(10);
- B. remand to the Trial Court to proceed with trial; and
- C. grant such other relief as this Court deems fair and just.

Respectfully Submitted,

ATTORNEY SOURCE, PLC

Dated: June 28, 2016

By: /s/ Nadia M. Hamade  
Nadia M. Hamade (P76944)  
*Attorney for Plaintiff-Appellant*  
30940 W. Seven Mile Rd.  
Livonia, MI 48152  
Phone: (248) 345-3343  
Email: nhamade@attorneysource.net

LAW OFFICES OF GARY BLOOM

Dated: June 28, 2016

By: /s/ Gary Bloom  
Gary Bloom (P10899)  
*Attorney for Plaintiff/Appellant*  
39040 W. Seven Mile Rd.  
Livonia, MI 48152  
Phone: (734) 464-1700